IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 16TH JANUARY 2007 / 26TH PAUSHA 1928

WP(C).No. 17473 of 2004(E)

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A.S.30/1999 OF ADDL.DISTRICT COURT, MAVELIKKARA
O.S.225/96 OF MUNSIFF COURT, HARIPAD

PETITIONER:

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SUKUMARAN, AGED 63, S/O.PAPPU,
OTTATHENGIL HOUSE, THOTTAPALLI MURI,
PURAKKAD VILLAGE, AMBALAPPUZHA.

BY ADV. SRI.P.N.RAMAKRISHNAN NAIR

RESPONDENTS:

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PONNAIPPAN, AGED ABOUT 57, S/O.PAPPU,
PUTHENPARAMBIL HOUSE, ERIKKAVU MURI, KUMARAPURAM
VILLAGE, KARTHIKAPALLY TALUK.

BY ADV. GEORGE VARGHESE (PERUMPALLIKUTTIYIL)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

EXT.P1: COPY OF JUDGMENT PASSED IN OS 225/96 BY MUNSIFF'S COURT, HARIPAD

EXT.P2: COPY OF IA 146/99 FILED BY PETITIONER IN AS 30/99 BY DISTRICT COURT, MAVELIKARA

EXT.P3: COPY OF ORDER PASSED IN IA 146/99

//True copy//

SHW TO JUDGE.

**M.SASIDHARAN NAMBIAR,J.**

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W.P.(C) .NO.17473 OF 2004

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Dated 16th January 2007

**J U D G M E N T**

Petitioner is plaintiff and respondent decree holder in O.S.225/1996 on the file of Munsiff court, Haripad. Suit was filed for recovery of vacant possession of plaint schedule item Nos.2 and 3 buildings. Petitioner contended that respondent is in possession of the buildings as a licensee and therefore petitioner is entitled to get vacant possession of the buildings. Respondent, the brother of petitioner admitting the title of the petitioner to the property contended that as per an agreement for sale respondent was put in possession of 31 cents of the property wherein he constructed the buildings spending Rs.30,000/- and Rs.40,000/- respectively and petitioner is not entitled to the decree for recovery of possession. Learned Munsiff after recording the evidence, under Ext.P1 judgment dismissed the suit. Petitioner filed A.S.30/99 before Additional District court-II, Mavelikara challenging the decree and

judgment. Along with appeal memorandum petitioner filed I.A.146/99 an application under Order VI Rule 17 of Code of Civil Procedure to amend the plaint or in the alternative permission to withdraw suit with liberty to file a fresh suit under Order XXIII Rule 1 of the Code. Learned District Judge under Ext.P3 order dismissed the application. This petition is filed under Article 227 of Constitution of India challenging Ext.P3 order.

2. Learned counsel appearing for petitioner and respondent were heard. Argument of learned counsel appearing for petitioner was that title of petitioner was not disputed and suit was dismissed for the reason that petitioner did not establish the license alleged in the plaint and in such circumstance petitioner was advised to file I.A.146/99 along with the appeal memorandum so that a comprehensive suit could be instituted claiming recovery of possession on the strength of title and therefore learned District Judge should have allowed that application. It was argued that even if petitioner is not permitted to withdraw suit with liberty to file suit as sought for, learned District Judge should have allowed the application for amendment of the plaint. Learned counsel appearing for respondent submitted that application under Order VI

Rule 17 of the Code was not pressed before the appellate court and prayer to withdraw suit under Order XXIII Rule 1 was dismissed by the court and there is no infirmity or illegality in Ext.P3 order warranting interference. Relying on the decision of Apex court in **K.S.Bhoopathy and others v. Kokila and others (2000 (5) SCC 458)** it was argued that when the effect of withdrawal of suit is nullifying the findings in favour of respondent by the trial court permission sought for cannot be granted and under Ext.P3, learned District Judge rightly dismissed the application and there is no reason to interfere with the said order. Relying on the decision of Apex court in **Kamlesh Kumari v. State of U.P and others (AIR 1982 SC 1248)** learned counsel argued that when learned District Judge has recorded that only the prayer for withdrawal of suit was pressed and so, it is to be taken that the prayer for amendment of plaint was not pressed and in such circumstance, there is no reason to interfere with Ext.P3 order.

3. As is clear from Ext.P1 judgment what was contended by petitioner was that item Nos.2 and 3 buildings were put in possession of respondent as a licensee and as license has been terminated, he is

entitled to get recovery of possession of the buildings. Respondent contended that there was an oral agreement for sale, whereunder property was put in possession of respondent and respondent constructed buildings and therefore petitioner is not entitled to recovery of possession sought for. Learned Munsiff on the evidence found that petitioner has no consistent case and therefore case of respondent that he put up buildings is probable and dismissed the suit. As rightly pointed out by learned counsel appearing for respondent, if the suit is permitted to be withdrawn finding entered in favour of respondent under Ext.P1 judgment would be nullified and therefore unless sufficient reasons are shown the application under Rule 1 Order XXIII to withdraw suit cannot be granted. Learned District Judge has considered the question in the proper perspective and dismissed the application. That is in accordance with law settled by Apex court in K.S.Bhoopathy's case (supra). It warrants no interference in exercise of extra ordinary jurisdiction of this court under Article 227 of Constitution of India.

4. Then the question is whether petitioner has to be permitted to amend the plaint as sought for. True, Ext.P3 order shows that in spite of main prayer being

the one under Order VI Rule 17 of the Code, what was pressed before learned District Judge was the application under Order XXIII Rule 1 of the Code. But considering the facts and circumstances of the case, it is only in the interest of justice to give a direction to learned District Judge, to consider the application under Order VI Rule 17 of the Code when the appeal is heard and pass appropriate orders in accordance with law.

Writ petition is disposed of accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.